

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EASTERN ZONAL BENCH, KOLKATA

Appeal No. C/76773/2016

Arising out of Order-in-Appeal No. KOL/CUS/(PRT)/SS/172/2016, Dated:
13.07.2016

Passed by Commissioner of Customs, Kolkata

Date of Hearing: 12.12.2018

Date of Decision: 12.12.2018

M/s INDIAN OIL CORPORATION LTD

Vs

**COMMISSIONER OF CUSTOMS
KOLKATA (PORT)**

Appellant Rep by: Shri Chandan Kumar, DGM (F)

Respondent Rep by: Shri S K Naskar, AC AR

CORAM: P K Choudhary, Member (J)

V Padmanabhan, Member (T)

Cus - The dispute is regarding the inclusion of ship demurrage charges in assessable value of goods imported by assessee - The Customs (Valuation) Rules, 1988 was superseded by Customs (Valuation) Rules, 2007 w.e.f. 10/10/2007 - The Customs (Valuation) Rules, 1988 did not have specific provision for inclusion of ship demurrage charges - Such provision stands inserted only w.e.f. 10/10/2007 - As such, there is no mandate for inclusion of ship demurrage charges upto 10/10/2007 - This issue was considered at length by Larger Bench of Tribunal in *Grasim Industries - 2013-TIOL-1387-CESTAT-AHM-LB* - By following the decision of Larger Bench, impugned order is modified and the Lower Authority is directed to re-assess Bills of Entry of assessee for the period 02/03/2001 until 09/10/2007 without including the ship demurrage charges in assessable value of the goods:
CESTAT

Appeal allowed

Case laws cited:

Indian oil Corporation Ltd - 2004-TIOL-23-SC-CUS... Para 2

Commissioner of Customs Vs. Grasim Industries Ltd - 2013-TIOL-1387-CESTAT-AHM-LB... Para 2

FINAL ORDER NO. 77105/2018

Per: Bench:

The present appeal is directed against the Order-in-Appeal No. KOL/CUS/(PRT)/SS/172/2016 dated 13/07/2016.

2. The appellant imported crude oil through Haldia Port for their refinery. For payment of Customs duty on the imported crude oil, provisional assessments were ordered for goods imported during the period 02/03/2001 to 09/10/2007. There were doubts whether ship demurrage charges were to be included in the value of the imported goods for the purpose of payment of Customs Duty. The question of whether ship demurrage charges were required to be included in the assessable value of imported goods was the subject matter of several clarifications issued by the Central Board of Excise and Customs. In the circular dated 14/08/1991, CBEC circulated that ship demurrage charges were not to be included in the assessable value. However, this stand was reversed by issue of a circular dated 02/03/2001. The issue came before the Hon'ble Supreme Court in the appellant's own case reported in 2004 (165) E.L.T 257 (S.C.)= 2004-TIOL-23-SC-CUS , in which the Apex Court decided that the Department circular dated 14/08/1991 was valid until it was reversed by circular dated 02/03/2001 and during this period, the Department cannot take a stand against its own circular. The Review Petition filed by Revenue in the Apex Court was also dismissed as reported in 2005 (196) E.L.T. A 199 (SC). Through the issue of the subsequent clarification dated 26/09/2006, the CBEC again directed the field formations to include the ship demurrage charges for the period from 02/03/2001. The dispute regarding inclusion of ship demurrage charges was ultimately decided by the Larger Bench of the Tribunal in the case of *Commissioner of Customs Vs. Grasim Industries Ltd.*, reported in 2013 (296) E.L.T. 39 (Tri.-L.B.) = 2013-TIOL-1387-CESTAT-AHM-LB. The Larger Bench took the view that the Rule 9 (2) of the Customs (Valuation) Rules, 1988 did not provide for inclusion of ship demurrage charges in the assessable value of imported goods. The Larger Bench further observed that specific provision for including ship demurrage charges was incorporated only in Rule 10 of the Customs (valuation) Rules, 2007. Accordingly, Larger Bench decided that until the Notification of the Customs Valuation Rules, 2007 (i.e. w.e.f. 10/10/2007), the ship demurrage charges cannot be included in the assessable value.

3. The provisional assessments in respect of the appeal period were finalized with the issue of Order-in-Original dated 24/05/2013 and the ship demurrage charges were ordered to be included in the assessable value, by following the circular dated 26/09/2006. The Commissioner (Appeals), however followed the decision of the Larger Bench and ordered that there was no justification for inclusion of the ship demurrage charges. The said order is being challenged in the present proceedings on the ground that the Commissioner (Appeals) has granted relief only for the period up to 26/09/2006. It is the contention of the appellant that the Customs (Valuation) Rules, 2007 was notified only on 10/10/2007, in which the provision for inclusion of ship demurrage charges has been incorporated. As such, it is the contention of the appellant that they will be entitled to the benefit of non-inclusion of such charges not only upto 26/09/2006, but also right upto 09/10/2007.

4. The appellant is represented by Shri Chandan Kumar, DGM(F) and the Revenue is represented by Shri S. K. Naskar, Ld. DR.

5. The Ld. Representative of the appellant explained at length the various circulars issued by the CBEC. He also took us to various relevant case laws including the decision of Larger Bench of the Tribunal in the case of Grasim Industries. Finally, he submitted that there is no mandate in the Customs (Valuation) Rules for inclusion of the ship demurrage charges, until 10/10/2007 when Rule 10 of the Customs Valuation Rules, 2007 made a specific provision. As such, he prayed that the appeal should be allowed up to 09/10/2007.

6. The Ld. DR Justified the impugned Order.

7. The dispute is regarding the inclusion of the ship demurrage charges in the assessable value of the goods imported by the appellant. The Customs (Valuation) Rules, 1988 was superseded by the Customs (Valuation) Rules, 2007 w.e.f. 10/10/2007. The Customs (Valuation) Rules, 1988 did not have specific provision for inclusion of ship demurrage charges. Such provision stands inserted only w.e.f. 10/10/2007. As such, there is no mandate for inclusion of the ship demurrage charges upto 10/10/2007.

8. This issue was considered at length by the Larger Bench of the Tribunal in the Grasim Industries (supra). The relevant observations of the Tribunal are reproduced below:-

"10. It can be seen from the above reproduced provisions of Rule 10(2) of the Customs (Valuation) Rules, 2007, the said rules are pari materia to the earlier provisions and it is seen that it includes an explanation which specifically talks about inclusion of ship demurrage charges lighterage or barge charges in the cost of transport of the imported goods. Both sides could not lay on record, any material to hold these provisions were applicable retrospectively.

11. We find strong force in the contentions raised by the ld. counsel as to the judgment of the Apex Court in the case of Ispat Industries Ltd. (supra) wherein their lordships were considering a similar issue would cover the case of the assessee. In the Ispat Industries Ltd. case, their lordships were considering as to whether the freight incurred on barges and other associated charges in transportation of the goods from Bombay Floating Light (in short BFL) to Dharamtar Jetty has also to be added for determining the correct assessable value for the purpose of calculating duty. Their lordships after considering the provisions of Section 14 of the Customs Act read with Customs Valuation (Determination of Price of Imported Goods) Rules, 1988, in paragraph 23 held as under :

"23. On first impression the submission of learned counsel for the Revenue appears to be sound, because surely the transportation by barge is also part of the transportation of the goods. However, on a deeper analysis, we are of the opinion that the submission of the learned counsel of the

Revenue is clearly untenable. Admittedly, all the contracts entered into with the foreign sellers are either CIF contracts or FOB contracts with Bills of Lading nominating Bombay/JNPT/Dharamtar as the ports of discharge. As such the cost of transport has already been included in the price paid to the seller under the CIF contract or an ascertainable freight determined and paid by the buyer from the foreign port to the Indian port. Hence, a further addition to the transport charges under Rule 9(2)(a) of the Customs Valuation Rules, 1988 is in our opinion clearly impermissible."

12. In our considered view, the above ratio laid down by the Apex Court could be the guiding factor in deciding the issue in reference as, the facts of this case may not be exactly the same as was being decided by the Apex Court in the case of Ispat Industries Ltd. The ratio of the Apex Court specifically lays down that if the contracts entered either CIF or FOB contracts and such type of contracts will always include the freight paid to seller, further addition to the transport charges under Rule 9(2)(a) of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 was clearly impermissible. It is also to be noted that subsequent to the judgment of the Apex Court, the legislature has brought in new Customs (Valuation) Rules, 2007 which provides for inclusion of cost of ship demurrage charges, lighterage and barge charges, in the value of transportation. In the light of the clear provisions, from the date when provisions of Customs (Valuation) Rules, 2007 came into picture, in our view, the ship demurrage charges needs to be included in the assessable value for discharge of customs duty. Prior to that date, in our view, the ship demurrage charges could not have been included in the assessable value of the goods imported.

13. Our above view is also fortified by the decision of the Hon'ble High Court of Kolkata in the case of Hindustan Lever Ltd. (supra). Hon'ble High Court in that case was considering an identical issue of non-inclusion of the demurrage charges paid to the port trust authority. The Hon'ble High Court in paragraph 9 held as under :

"9. Value of the goods for the purpose of assessment of Customs Duty has been defined under Section 14(1) of the Customs Act, 1962. According to Section 14(1) of the Customs Act value of the goods means price at which such goods are ordinarily sold or offered for sale for delivery at the time and place of importation or exportation. When the goods are offered for sale at the place of importation it includes freight charges and as such the freight is included in the value of the said goods. Demurrage is an eventuality which causes not due to importation or exportation of the goods. The goods are imported as and when it arrives at the port. Unloading of such consignment is an event consequential to making of effective delivery. If there is any delay at the time of unloading for any reason the consignee will have to pay demurrage charges to the port authority in view of the fact that the berth is unnecessary blocked because of delay in unloading. This is an eventuality which has nothing to do with

regard to importation of the goods for the purpose of assessment of customs duty. Customs duty is charged on the basis of the value described in the bill of lading. If there is any under-invoicing made, the authority is entitled to take appropriate assessment to find the actual value. In no stretch of imagination the demurrage can be included in the value of the goods for the purpose of assessment of customs duty under Section 14(1) of the Customs Act, 1962 or any other provision of the said Act."

9. By following the decision of the Larger Bench, we modify the impugned order and direct the Lower Authority to re-assess Bills of Entry of the appellant for the period 02/03/2001 until 09/10/2007 (both days inclusive) without including the ship demurrage charges in the assessable value of the goods. In the result, appeal is allowed.

(Dictated and Pronounced in the Open Court)